#### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD WASHINGTON, DC

SPECIALTY HEALTHCARE AND REHABILITATION CENTER OF MOBILE	) ) )	
	)	CASE 15-RC-8773
And	)	
LAUTED STEEL WORKERS DISTRICT O	)	
UNITED STEELWORKERS, DISTRICT 9	)	
	)	
	)	

## BRIEF OF AMICUS CURIAE RETAIL INDUSTRY LEADERS ASSOCIATION

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#### I. INTRODUCTION

This brief is submitted in response to the invitation of the National Labor Relations Board (hereinafter "the Board") to file briefs in the matter of *Specialty Healthcare and Rehab. Ctr.* of Mobile, 356 NLRB No. 56 (December 22, 2010).

#### A. Questions Presented

We submit this brief on behalf of the Retail Industry Leaders Association (hereinafter "RILA"), to address the following two questions posed by the Board:

- (7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute care facilities. Should such a unit be presumptively appropriate as a general matter.
- (8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest."

Specialty Healthcare, 356 NLRB No. 56, slip op. at 2.

#### **B.** Statement Of Interest

RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include the largest and fastest growing companies in the retail industry – retailers, product manufacturers and service suppliers – which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers located both domestically and abroad.

Any changes in the unit determination standards used by the Board would have a significant impact upon RILA's members because most, if not all, fall under the jurisdiction of the National Labor Relations Act, as amended 29 U.S.C. Section 151 *et seq.* (hereinafter "the Act").

RILA believes that the historical "community of interests" standard developed by the Board has served as a solid basis for determining appropriate bargaining units. That standard balances the interests of employees and unions in organizing as well as the interests of employers (particularly in the retail industry) in productively managing their businesses. Any change in this standard that would serve to balkanize the structure of the employer's business would adversely impact RILA members and their businesses, complicate labor relations and collective bargaining, threaten to embroil customers and other members of the public in labor disputes, and build in delay and increased costs in the Board's currently fair and efficient representation process.

RILA is thus concerned that the Board's proposed action will cause a massive disruption in its industry without any necessary precipitating purpose.

Nevertheless, if the Board is intent on revisiting the historical community of interests standard, it should address this through rulemaking and not adjudication. Rulemaking provides a more reliable and efficient process for gathering evidence and information. It is a more accessible forum for the airing of various arguments and opinions regarding specific proposals, and it does not evade the oversight role of the Administration and the public through the Administrative Procedure Act or that which Congress intended to reserve to itself under the Congressional Review Act.

For all of the foregoing reasons, RILA submits that it has a significant interest in the Board's activities in this area, and therefore submits this *amicus* brief.

#### C. Summary Of Argument

The language of the Act, Board case law, as well as the policies and procedures for the determination of an appropriate unit all demonstrate that the presumptive single-factor rule contemplated in Questions 7 and 8 is inappropriate and unnecessary. The establishment of a blanket rule intended to be applied without inquiry into the facts of the individual employer and the community of interests shared by employees is contrary to Sections 9(b)<sup>1</sup> and 9(c)(5)<sup>2</sup> of the Act.

In Section 9(b) of the Act, Congress specifically mandated that *in each* case before it, the Board must decide which bargaining unit is appropriate after giving due consideration to, and balancing, the sometimes competing interests of employers and employees. The current "community of interests" standard in use today correctly and appropriately inquires into the circumstances of each situation. On the other hand, a presumptive rule based on a particular "job" would automatically assign great weight to one narrow, and often irrelevant, aspect of the bargaining unit consideration, job classifications. As any employer knows, the job classification is often an imprecise label that gives little or no guidance as to the employee's actual job duties, his or her interaction with employees in other classifications, or the employee's role in the overall structure of the business.

Presumptive rules based on job titles weaken if not eviscerate the prohibition contained in Section 9(c)(5), as such rules necessarily would give controlling weight to the extent of organization.

"The Box

<sup>&</sup>lt;sup>1</sup> "The Board shall decide, *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof..." 29 U.S.C. Section 159(b) (emphasis added).

<sup>&</sup>lt;sup>2</sup> "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling." 29 U.S.C. Section 159(c)(5).

The Board's invitation in this case could not be more ill timed. After two long, hard years in a deep recession, the economy appears to be showing some nascent signs of recovery. Now is not the time to develop rules that would serve to disrupt the workplace unnecessarily. The essential question to ask is whether there exists a necessity to discard the Board's well-developed analyses for determining an appropriate bargaining unit. The answer must be "no." Presumptive bargaining unit rules based on job titles and applied to businesses without careful thought about how such a unit might affect the way an employer has organized its business can have but one effect: to stifle economic growth.

The legislative history of the Act and extant Board case law are replete with examples of how the possibility of forcing an employer to bargain with multiple separate units when it would not make sense to the particular business operations can hinder the business. Yet, both presumptive rules identified in Questions 7 and 8 of the Board's invitation in this case would make it much more likely that an employer would be confronted with the prospect of having to deal with multiple bargaining units, the cumulative effect of which would cause disruption to business operations. For example, a rule that proposes a bargaining unit of "all employees working in the same job at a single facility" means the employer could potentially face dozens of separate bargaining units, each with its own attendant bargaining obligation, and each with conflicting interests.

Further, the Board has not inquired regarding the effect its presumptive rules would have on the operations of the Board itself. Can the Board deal with the greatly increased caseload the application of the rules would likely engender? Has the Board considered the significantly increased costs to employees, unions and management resulting from the vastly increased representation proceedings to which the presumptive rules would lead? Perhaps it did not do so

because such an inquiry is not appropriate to adjudication, whereas it would be appropriate in a more general examination under a structured rulemaking.

The legislative history and case law also demonstrate that the interests of employees are not served by placing them into discrete, smaller units. For example, employees placed into a representative situation limited by "job" or "classification" face the negative prospect of being cut off from or, at a minimum, disadvantaged in obtaining promotional and training opportunities in other parts of the organization.

Additionally, less than two months ago, President Obama issued his Improving Regulation and Regulatory Review Executive Order 13563 (January 18, 2011), recognizing the fragile state of the economic recovery. The Executive Order states as a general principle, "[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." The Executive Order directs agencies to prepare plans to review existing regulations in order to make them "more effective or less burdensome" on employers.

The Executive Order directs agencies to use the due process procedures attendant to formal rulemaking, including notice and comment periods. The manner in which the matter arose in this case is directly contrary to the Executive Order in all respects, as well as the Board's own previously indicated plans, including extensive staff training, to engage in formal rulemaking. Rather, it represents a thinly veiled effort to end run around established procedures. It would change long established rules, and avoid necessary oversight by the Office of Management and Budget, the Government Accountability Office, the Congress, and the impacted parties.

In sum, the Board should not consider the establishment of these types of bargaining unit rules in any industry.

# II. "ONE SIZE FITS ALL" BARGAINING UNIT DETERMINATIONS BASED SOLELY ON JOB TITLES OR OTHER SINGLE CRITERIA ARE CONTRARY TO CONGRESSIONAL INTENT

# A. In Its Enactment Of Section 9(b), Congress Charged The Board With Making A Thoughtful Inquiry Into Each Case When Deciding What Constitutes An "Appropriate Unit"

Fashioning a "one-size-fits-all" rule for determining bargaining units based on "employees performing the job" is contrary to the plain language of the Act and, more importantly, the express intent of Congress. Section 9(b) of the Act, the relevant part of which has not changed since its original 1935 enactment, is clear:

The Board *shall decide in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . <sup>3</sup>

#### 29 U.S.C. Section 159(b) (emphasis added).

The plain language of Section 9(b) contemplates that the Board will decide the appropriate bargaining unit in each individual case before it. The statute does not authorize a cookie cutter rule for application along the lines of employee job titles, or any other single factor. Rather, each situation presents different facts requiring discrete analysis by the Board.<sup>4</sup>

<sup>&</sup>lt;sup>3</sup> The "Proviso" language in the current Section 9(b) was added by the 1947 amendments and is not germane to the issues addressed herein.

<sup>&</sup>lt;sup>4</sup> There are, of course, exceptional cases where an employee's classification mandates a grouping, but these are mainly statutory requirements. For example, the Act generally requires guards to be set apart from other employees Section 9(b)(3), supervisors to be excluded from bargaining units (Sections 2(3), 2(11) and 7), and professional employees to be grouped together (Section 2(12)). For all of these statutory distinctions, the Board has established tests to analyze whether a person fits into a certain category. For the vast majority of other employees, the last time the Board issued a rule regarding bargaining units was through formal rulemaking with the healthcare amendments. 29 C.F.R. § 103.30.

Section 9(b) of the Act is based on Section 2(4) of the Railway Labor Act ("RLA") of 1934, which provides:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have a right to determine who shall be the representative of the craft or class for the purpose of this act.

Comparison of S. 2926 and S. 1958 (1935 Comm. Print), reprinted in 1 NLRB, *Legislative History of the National Labor Relations Act of 1935*, at 1355 (1949). The RLA provision is distinct from what became Section 9(b) of the Act in one very important respect: the RLA does not contain language mandating a decision by the National Mediation Board ("NMB") as to the appropriate unit in each representation case. Congress explained this fundamental difference between the RLA and the Act in its comparison of S. 2926 (the original Senate bill proposing what was to become the Act) and S. 1958 (what ultimately was enacted as the Act):

... The same necessity for unit determination is embraced in the definition of majority rule in the Railway Labor Act of 1934 as set out above, although in that industry the nature of the department or craft alinement [sic] is so clearly defined as to require no express elaboration.

*Id.* at 1356 (emphasis added).

In this distinction between the RLA and the Act, Congress recognized that the range of employers and areas of commerce that fall under the jurisdiction of the Act are vastly broader than, and different from, the railroad (and now airline) industry in any number of material respects: the virtually unlimited types of businesses, the myriad skill sets and types of employees needed, the size and organization of the businesses, to name but a few. In sum, Congress recognized that a "one size fits all" approach to bargaining unit determination, accepted as

<sup>&</sup>lt;sup>5</sup> The National Mediation Board was established by the 1934 amendments to the Railway Labor Act. *See* 45 U.S.C. §151(3).

appropriate under the RLA, is simply not possible for the broader range of businesses and employees in the private economy subject to the Act.

The specific role of the Board in making a "decision" pursuant to Section 9(b) was part of a larger debate over the wisdom of majority elections, another mechanism borrowed from the pre-Act labor boards, including the NMB. This "majority rule" debate naturally led to a discussion of why the Board needed to decide *who* among the employees should be allowed to vote:

The major problem connected with the majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the act, may be a craft, plant or employer unit. The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant.

Hearing on S. 1598 Before the Committee on Finance, Education and Labor, Indian Affairs, and Manufactures, 74th Cong. 1458 (1935) (Testimony of Francis I. Biddle, Chairman of the precursor to the National Labor Relations Board) (emphasis added).

The specter of the establishment of multiple discrete bargaining units with little or no regard to the structure of the employer's business was a concern prior to the passage of the Act.

This concern is as valid today as it was in 1935, and is precisely why the rules contemplated in

Questions 7 and 8 are problematic. This is why the Board was charged with the responsibility to ensure such splintering of the workforce into multiple, discrete and disruptive bargaining units did not occur. A presumptive rule that ignores – indeed, prohibits – full consideration of the employer's interests in managing its business is contrary to the Board's mandate.

The final Senate report on the Wagner Act confirms the Board's role as evaluator of the situation before it:

Section 9(b) empowers the National Labor Relations Board to decide whether the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind. This provision is similar to section 2 of the 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—'In the conduct of any election for the purpose herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election.'

#### S. Rep. No. 74-573 (1935).

Here, too, one can see that Congress chose the words of Section 9(b) very carefully when drafting the Act. Congress did not simply adopt the language from the RLA, where the NMB has authority to *designate* the bargaining unit generally. In consideration of the virtually limitless ways in which a non-railroad employer is free to organize its business, under the Act the Board was given both the authority and the responsibility to *decide* what would be in the interests of the *employees and employer* in a particular situation (i.e., "in each case"). Congress thereby recognized in Section 9(b) an employer's legitimate concern that its business not be disrupted by multiple bargaining units which ignore the larger community of interests of its employees.

- B. Any "One Size Fits All" Rule Based On "Jobs" Or Any Other Single Factor Impermissibly Ignores The Manner In Which The Employer, Either By Choice Or Operational Necessity, Has Organized Its Business
  - 1. Extant Board Law Demonstrates The Importance Of Evaluating A Business' Structure In Determining An Appropriate Bargaining Unit

The Board has recognized throughout its history that each covered employer may, and in fact does, structure its business, organize its workforce and operate its facilities in a manner satisfactory to its own particular business interests and management model. How the employer has organized its business and workforce is, therefore, a fundamentally important consideration in making bargaining unit determinations. In *Int'l Paper Co.*, 96 NLRB 295 (1951), the Board discussed this consideration as follows:

We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination.

*Id.* at 298, n.7. The Board went on to identify at least three variations in which a group of employees, all of whom held the same job title, might nonetheless be grouped differently for the purposes of collective bargaining based solely upon the type of work they were regularly assigned within their facility and the manner in which they were asked to perform it.<sup>6</sup>

In *Birdsall, Inc.*, 268 NLRB 186 (1983), the Board found that the "factual reality of the employer's operation" compelled a determination that a broader unit than the one the union sought was appropriate. *Id.* at 190, *quoting Int'l Paper Co.*, 96 NLRB 295 at 298, n. 7 (1951). Even though the employer's operations were spread across four separate facilities, the Board

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<sup>&</sup>lt;sup>6</sup> Examples included: (1) when all welders in a plant are "regularly assigned to work with particular crafts"; (2) when "craft welders comprise a pool of employees who are not regularly assigned to work with any particular craft, but work throughout the plant with whatever group may need their services"; and (3) where some welders are regularly assigned to particular crafts but a substantial number act, as in the second situation, as a roving pool." *Id.* at 297-298.

found they operated with a sufficiently high degree of "functional integration, including substantial interchangeability and contact among employees" to give the business "its distinctive character" and warrant expansion of the bargaining unit in question. *Birdsall*, 268 NLRB at 190.

When the Board has not given sufficient consideration to the employer's business organization, the Courts of Appeals have refused to enforce an order to bargain. In *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), for example, the D.C. Circuit set aside the Board's determination that heavy equipment operators were by themselves an appropriate unit after finding that the Board did not "sufficiently take into account" the terms and conditions of employment then in effect within the employer's entire facility. *Id.* at 1270 (citing Gustave Fisher, Inc., 256 NLRB 1069 (1981)).

Similarly, in *NLRB v. Meyer Label Co.*, 597 F.2d 18 (2d Cir. 1979), the Second Circuit held "the Board did not adequately consider the Company's specific structure and mode of operations" when it rejected the Board's unit determination of 8 of 30 employees as inappropriate. The Court noted the potential consequences of not properly considering the employer's business needs:

The Company might be forced to restructure its operations and reorganize its production. Other employees similarly situated, i.e., those employees who frequently utilize offset presses and engage in art preparation for offset work, might be adversely affected because they might have their conditions set by a union which does not represent them. Conversely, those employees included in the unit either might not be assigned to other jobs or, if they were so assigned, the conditions for nonunit work might be bargained by a union representing only those eight employees in the bargaining unit. In so small a plant, these restrictions and impediments might make it impossible for the Company to continue its operations.

Id.

In sum, employees and employers have interests driven by the way the business and the workforce are structured and managed. The exact nature of these interests must be analyzed on a case-by-case basis, as it is under the current law, and not controlled by presumptive rules as suggested by the Board's invitation to amici in the instant case.

## 2. "Job Classifications" Are Largely Irrelevant In Bargaining Unit Analyses

The presumptive rules contemplated in Questions 7 and 8 of the invitation would give great weight to "jobs" and "classifications," things that provide little meaning without context into how they fit into an employer's organization, and which are currently given little, if any, weight in bargaining unit analysis. The factor of employees "performing a job" tells us little if anything about how the employee fits into the employer's organization and with which other employees he or she may truly share a community of interests. A person's title or classification does not give any information about what the employee may actually do or how the employee interacts with employees in other "jobs" in the facility, which are crucial inquiries in determining the community of interests.

An example of how the job title is often meaningless without further inquiry is demonstrated in an example from the retail industry. In *Wal-Mart Stores, Inc.*, 328 NLRB 904 (1999), the Board found inappropriate a proposed unit limited to "meatcutters," which was proposed by the union. In so concluding, the Board noted that, as "case-ready" meats had become increasingly prevalent within the grocery industry, fewer and fewer employees bearing the title "meatcutter" did more than unload already butchered, packaged meats from boxes and remove them to shelves within their employers' stores. *Id.* at 905 (citing Scolari's Warehouse

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<sup>&</sup>lt;sup>7</sup> We note that in the Fair Labor Standards Act, the sister bedrock employment statute to the National Labor Relations Act, the Secretary of Labor has made it clear that job titles cannot be used to determine a worker's classification, as a myriad of functions are encompassed within each job title. 29 CFR § 541.2.

Mkts., 319 NLRB 153 (1995)). Many of these employees no longer exercised "traditional craftsperson meatcutting skills, such as cutting whole animal carcasses into primal and subprimal sections," and, despite their classification, possessed a greater shared community of interests with other meat department employees, such as cleaners and wrappers, than they did with meatcutting employees who possessed such specific skills. *Id.* at 907. As a result, the Board held that the appropriate bargaining unit for the employees in question should encompass those within the facility's entire meat department. *Id.* at 908.

Similarly, in *Wheeling Island Gaming, Inc.*, 355 NLRB No. 157 (August 27, 2010), the Board affirmed a finding that a unit limited solely to "poker dealers" was inappropriate, and should instead be broadened to include all of the employer's gaming employees, including employees operating the craps and roulette tables, as well as blackjack dealers. In so finding, the Board held that its "inquiry never addresses, solely and in isolation, the question of whether the employees in the unit sought have interests in common with each other." *Id.*, slip op. at 1, n. 2. Rather, the inquiry is whether the employees in the proposed unit are "sufficiently distinct" from the remaining employees. *Id.* (quoting Newton-Wellesley Hosp., 250 NLRB 409, 411-412 (1980)). These statements were in direct response to Member Becker's dissent, in which he asserted the poker dealer-only unit was appropriate because, "[f]rom the perspective of the employees, this is one of the most logical and appropriate within which to organize for the purpose of engaging in collective bargaining." 355 NLRB No. 127, slip op. at 3. The dissent's viewpoint is, of course, exactly the type of rule the Board is considering in this case, a viewpoint at odds with Section 9(b) and Board case law.

## C. Adoption Of Presumptive Rules Would Eviscerate Section 9(C)(5) Of The Act

The type of rule contemplated in Question 8 of the Board's invitation to file briefs will greatly undermine Section 9(c)(5), which prohibits the Board from allowing its determination of an appropriate bargaining unit to be "control[ed]" by the extent to which the employees in question may already have organized. 29 U.S.C. § 159(c)(5). According to the United States Court of Appeals for the Fourth Circuit, "[section] 9(c)(5) does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling' weight." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4<sup>th</sup> Cir. 1995) *(citing Arcadian Shores*, 580 F.2d 118, 119 (4th Cir. 1978)).

In *Lundy Packing*, the Fourth Circuit held that the Board had run afoul of § 9(c)(5) when it found a bargaining unit proposed by the union proper even though its decision had given "controlling weight" to the extent of union organization within the employer's facility. *Id.* at 1579. In so holding, the Court stated:

By presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because 'the union will propose the unit it has organized.'

Id. at 1581 quoting Laidlaw Waste Sys., Inc. v. NLRB, 934 F.2d 898, 900 (7th Cir. 1991); see also Cont'l Web Press, Inc. v. NLRB, 742 F.2d 1087, 1093 (7th Cir. 1984) ("the fact that... the union wanted a smaller unit... could not justify the Board's certifying such a unit if it were otherwise inappropriate"). Given the fact that a number of employees found to have shared a community of interests with those included within the bargaining unit nonetheless had their

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<sup>&</sup>lt;sup>8</sup> "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

ballots challenged and excluded by the union, the Court said, "it is impossible to escape the conclusion that the... ballots were excluded 'in large part because the Petitioners do not seek to represent them." *Id.* at 1581 (quoting Lundy Packing, Inc., 314 NLRB 1042, 1046 (1994)). Thus, according to the Fourth Circuit, the Board's ruling bore "the indicia of a classic [section] 9(c)(5) violation." *Id.* 

The type of presumptive rule contemplated in Question 8 of the invitation to file briefs would not only invite such violations of §9(c)(5), but would make it all but impossible to avoid them. Such a presumptive rule would, for all intents and purposes, render that section of the Act null and void. Because the proposed rule would dispose of the traditional "community of interests" test in favor of a presumption that units based upon job description or classification are automatically appropriate, a union seeking to organize employees will have to establish little or nothing beyond a shared job title for any group it might deem satisfactory to organize.

## D. Presumptive Rules Based On "Jobs" Or "Proposed Unit" Would Not Work In The Retail Industry

The blanket rule suggested by Questions 7 and 8, according to which employees ostensibly performing the "same job" would be presumed to comprise an appropriate bargaining unit without consideration of or regard for the particularities of the industry within which they work, would do away with roughly 60 years of evolving case law specific to the retail industry. As that body of law acknowledges, the retail sector has unique attributes that render it particularly ill-suited to the application of such rules.

In 1962, the Board abandoned its previous practice whereby appropriate units for retail chain stores were evaluated according to the employer's administrative organization and the store's geographic location, and began to evaluate each case on its particular facts. *See Sav-On Drugs, Inc.* 138 NLRB 1032 (1962). By 1968, however, the Board's experience in the

intervening years led it to announce a new rule: "a single store in a retail chain, like single locations in multilocation enterprises in other industries, is presumptively an appropriate unit for bargaining." *Haag Drug Co., Inc.*, 169 NLRB 877, 877 (1968). As the Board stated:

The employees in a single retail outlet form a homogeneous, identifiable and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from, the functions of employees in the other outlets, and thus their problems and grievances are peculiarly their own and not necessarily shared with employees in the other outlets.

*Id.* at 877-878. Absent some compelling reason to treat them otherwise, such as "a bargaining history in a more comprehensive unit or functional integration of a sufficient degree to obliterate separate identity," the Board concluded that the employees' "fullest freedom" was maximized by treating those within a single store or restaurant chain operation as an appropriate bargaining unit. *Id.* at 877.

The Board's single-store retail chain rule has withstood the test of time. *See, e.g., Walgreen Co.*, 198 NLRB 877 (1972); *Gray Drug Stores*, 197 NLRB 924 (1972); *V.I.M. Jeans*, 271 NLRB 1408 (1984); *Acme Mkts., Inc., 328* NLRB 1208 (1999). The Board also has long held that the appropriateness of a storewide unit does not establish that a smaller unit is also appropriate. *Montgomery Ward & Co.,* 150 NLRB 598 (1965).

Were the Board to extend the rules contemplated in Questions 7 and 8 to the retail industry, it would ignore this long-held precedent. In place of predictability, the Board's rule would insert the unknown. Instead of stability, it would offer the potential for chaos, as employees currently – and, according to Board precedent, appropriately – placed within homogeneous single-facility bargaining units could be splintered into departmental fiefdoms,

each of which would seek to gain leverage and personal advantage. Put simply, 60 years of success indicates there is no problem with the single-store, single-unit presumption the Board currently applies. History likewise suggests that there is every reason to maintain this stability, and not to adopt the change suggested by the Board's questions.

### E. A Presumptive Rule Would Adversely Affect Employers, Employees, And The National Labor Relations Board Itself

Among the many sources of possible disruption that the Board's proposed rule may bring in its wake is the administrative difficulty – including a near-constant state of bargaining – that will likely accompany the requirement to deal with multiple bargaining units. Employers, at significant cost and operational inefficiency, would likely have to establish separate administrative structures, including but not limited to benefits and payroll, to manage grievances, pension funds and a host of other new issues. *See, e.g., NLRB v. Meyer Label Co., Inc.*, 597 F.2d 18, 22 (2d Cir. 1979). There is also the distinct and destabilizing possibility that unions will be able to work in concert with one another to "whipsaw" the employer and force it to provide higher wages or benefits than the market would otherwise allow, a situation with the clear potential to put an entire enterprise at risk. *Id.* Multiple units would force managers to navigate among different contracts and interests of fragmented units, requiring them to triage different demands rather than dealing with a uniformed collective bargaining structure. This would undermine the labor peace and industrial stability the Board is charged with promoting.

Employers, though, are unlikely to bear the burden of the Board's ill-advised experiment alone. Employees too, may suffer, in the form of potentially reduced career opportunities should promotions or transfers be hindered by organizational unit barriers. *See id.* (listing potential adverse affects to employees if an eight-person bargaining unit were to be allowed within a 30-employee facility). Tension within the workplace is also likely to increase – potentially bringing

with it a concomitant decrease in employee morale – as employees review favorable contract terms gained by others and seek parity among the separate units. *Id; see also Int'l Paper Co.*, 96 NLRB 295, 298 (1951) (stating that "collective bargaining with respect to the terms and conditions of welders' employment is certain to be encumbered if some welders are bargained for as part of other craft units while other welders are bargained for in a welders' unit").

Furthermore, artificial unit boundaries based on job titles or classifications may make it more difficult for an employer to achieve its diversity goals, with the result that a subtle, unintentional form of discrimination may become all but institutionalized. For example, employers that are government contractors must comply with a detailed set of regulations that mandate the development of affirmative action plans requiring that workforces be allocated among various measurable job groups enabling them to quantify their affirmative action efforts. See 41 C.F.R. § 60-1 et. seq. Job groups are combinations of employees with similar wage rates, content and opportunity. 41 C.F.R. § 60-2.12(b). If the employer has less than 150 employees, the employer can use the EEO-1 designations which broadly divide employees into nine occupational groups. 41 C.F.R. § 60-2.12(e). In either situation, however, the required job group is significantly larger than the small, highly specialized grouping the presumptive rule would mandate. Thus, if the presumptive rule is adopted, covered employers who are also government contractors would not be able to meet their affirmative action obligations. Beyond that, the historical measurements used by the equal employment agencies, including analyzing lines of progression and other normal employee mobility factors, would not be available for analysis.

The Board, too, would be impacted directly, as it would likely face a flood of new election petitions which, because of the radical change in the law, would almost certainly require

costly and time-consuming hearings and appeals. Such a dramatic increase in petitions, along with the priority the Board gives to representation cases, might be expected to force delays in the handling of other regional business, including unfair labor practice hearings, with the result being unnecessarily delayed justice for the parties involved. Beyond that, many of the employers who lose these novel classification unit elections can be counted upon to seek judicial review. The potential therefore exists for hundreds, if not thousands, of representation cases to remain in limbo for years as they await clarification by the courts.

#### F. Board Representation Case Handling Does Not Demonstrate The Need For Any Change In The Underlying Law Regarding Bargaining Units

The Board's well-developed historical approach to defining appropriate bargaining units has not led to problems in the processing of representation cases. Indeed, by any measure, the Board's own current statistics demonstrate that under existing law, representation case handling is efficient, timely and fair.

Currently, Board processing of representation petitions is exemplary. According to the Acting General Counsel's Summary of Operations for FY 2010, the median time for conducting initial representation elections was 38 days. Over 95 per cent of all such petitions resulted in elections within 56 days. These latest statistics compare favorably to those generated over time. According to the General Counsel's annual summary of operations for fiscal years 2006 through 2009, the median time for conducting initial representation elections has varied between 37 and

<sup>&</sup>lt;sup>9</sup> Feinstein, Frederick L., "Testimony of Frederick L. Feinstein Before the Commission on the Future of Worker-Management Relations" (1994). *Federal Publications*. Paper 341.

http://digitalcommons.ilr.cornell.edu/key\_workplace /341 (stating that "There is no responsibility the NLRB undertakes that is more important than conducting elections to determine whether or not employees will be represented by a union. The effectiveness of our statute is grounded on our ability to swiftly and fairly resolve the fundamental issue of representational status.").

<sup>&</sup>lt;sup>10</sup> Memorandum GC 11-03 (January 10, 2011).

39 days. <sup>11</sup> The percentage of all elections completed within 56 days has varied between 93 per cent and 95.5 per cent. *Id*.

Further, unions have had unprecedented success in winning elections under the current rules. According to Board statistics, in FY 2010 unions won 65.9 per cent of initial representation elections. This also compares favorably with those generated over time. For fiscal years 2006 through 2009, unions won between 59.8 per cent and 68.5 per cent of all such elections. Again, nothing in these current statistics demonstrates any need to change existing law in the representation case area.

Clearly, units approved by the Board under existing law are not the source of any delay or disruption of the representation process.

# III. IF THE BOARD ACTS TO CHANGE THE RULES FOR DETERMINING AN APPROPRIATE BARGAINING UNIT AS CONTEMPLATED IN THIS CASE, IT SHOULD DO SO THROUGH RULEMAKING AND NOT ADJUDICATION

In its call for *amicus* briefs, the Board explained that it would initiate the rulemaking process if it became "convinced that rulemaking would be a fairer or otherwise more appropriate means to address the questions raised in this case." *Specialty Healthcare*, 356 NLRB No. 56, slip op. at 3. As discussed more fully below, implementing such sweeping changes via adjudication instead of rulemaking would also violate the requirements of the Administrative Procedure Act ("APA"). Notwithstanding the compelling argument raised in Section II that there is absolutely no justification for the Board to undertake the examination addressed in this case by adjudication, to the extent that it can show such justification, the only appropriate means

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<sup>&</sup>lt;sup>11</sup> Memorandum GC 07-03 (January 3, 2007)(FY 2006); Memorandum GC 08-01 (December 5, 2007)(FY 2007); Memorandum GC 09-03 (October 29, 2008)(FY 2008); Memorandum GC 10-01 (December 1, 2009)(FY 2009). <sup>12</sup> http://nlrb.gov/chartsdata/petitions

to undertake this inquiry is by formal rulemaking, with all of the legal protections such a process entails.

#### A. The APA's Rulemaking Requirements Generally

First enacted in 1946, the APA was seen as a "strongly marked, long sought, and widely heralded advance in democratic government." Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at iii (1946) (statement of Sen. McCarran). Central to that advance in democratic government were the APA's rulemaking requirements, which "ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). The APA defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule," in turn, is broadly defined as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." § 551(4).

To engage in rulemaking, an agency must first publish a notice of proposed rulemaking in the *Federal Register*. 5 U.S.C. § 553(b). Among other things, that notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The agency must then give interested persons an opportunity to participate in the rulemaking "through submission of written data, views, or arguments with or without opportunity for oral presentation." § 553(c). "After consideration of the relevant matter presented," the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* Except in limited circumstances, a final rule must then be published in the *Federal Register* not less than 30 days before the rule's effective date. § 553(d). Furthermore, "[e]xcept to the extent

that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the *Federal Register* and not so published." § 552(a)(1).

Other statutes impose additional requirements on the rulemaking process. For example, the Congressional Review Act, 5 U.S.C. §§ 801-808, requires agencies promulgating a rule to submit a report to each House of Congress and to the Comptroller General that contains a copy of the rule, a concise general statement describing the rule, and the proposed effective date of the rule. 5 U.S.C. § 801. In addition, the promulgating agency must submit to the Comptroller General a complete copy of any cost-benefit analysis, a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995, and any other relevant information required under any other statute or executive order. § 801(a)(1)(B). Congress then has 60 days in which to reject the rule via a joint resolution. § 802; *see, e.g.*, Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 (disapproving Department of Labor ergonomics rule pursuant to the Congressional Review Act).

#### B. The APA's Rulemaking Requirements Govern The Board

Section 6 of the Act specifically provides that the Board must comply with the APA's rulemaking requirements. *See* 29 U.S.C. § 156 ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of [the Act]."); *see also Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-10 (1991) (affirming the Board's authority to issue a regulation governing bargaining-unit determinations in the context of acute care hospitals); Collective-Bargaining Units In the Health Care Industry (Final Rule), 54 Fed. Reg. 16,336, 16,338 (Apr. 21, 1989) (acknowledging the Supreme Court's suggestion in *NLRB v. Wyman*-

Gordon Co., 394 U.S. 759 (1969), that the Board "would be better advised to utilize its rulemaking powers" instead of adjudication when the Board promulgates "rules"). That was not always the case.

Section 6 was first enacted more than a decade before the APA. See National Labor Relations Act (Wagner Act), ch. 372, § 6, 49 Stat. 449, 452 (1935) ("The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe."). Importantly, however, Congress amended Section 6 shortly after the APA's passage in order to limit the Board's discretion by ensuring that the Board must follow the APA's rulemaking requirements. See Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 6, 61 Stat. 136, 140 (deleting the second sentence of Section 6 and amending the first sentence to provide that "[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act") (emphasis added) (codified at 29 U.S.C. § 156); see also H.R. Rep. No. 80-510, at 38 (1947) (Conf. Rep.) (explaining that amended Section 6 ensured the APA's rulemaking requirements governed the Board), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 542 (1948).

C. The Board Would Violate The APA By Using This Adjudication As A Vehicle To Promulgate An Otherwise-Unnecessary "One Size Fits All" Rule For Defining Appropriate Bargaining Units

Although an agency's choice between rulemaking and adjudication lies in the first instance within the agency's discretion, there are situations where an agency's reliance on adjudication instead of rulemaking would amount to an abuse of discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1973). For example, "agencies can proceed by adjudication

to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981); *see also Pfaff v. HUD*, 88 F.3d 739, 748 (9th Cir. 1996) (explaining that an agency abuses its discretion "where the new standard, adopted by adjudication [instead of rulemaking], departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application").

The Board's call for *amicus* briefs contained language suggesting that the Board may use this case as a vehicle for rewriting the standards for making bargaining-unit determinations generally. *See* Dec. 22, 2010 Order at 2; *see also id.* at 6 (Member Hayes, dissenting) (explaining that the Board's call for *amicus* briefs suggests that the Board is "considering a broad revision of a test for determination of appropriate units in all industries under [the Board's] jurisdiction"). If the Board were to issue such an order in this case, however, the Board would change law existing since its enactment in 1935 and establish rules of widespread application – something that, if it is to be done at all, must be done via rulemaking, not adjudication. *See Ford Motor Co.*, 673 F.2d at 1009; *see also Specialty Healthcare*, 356 NLRB No. 56, slip op. at 6. (Member Hayes, dissenting) (explaining that, "while the Board has broad discretion to make law through case-by-case adjudication rather than through rulemaking," the majority's actions "test, and likely exceed, the limits of that discretion here").

The foregoing conclusion is also supported by the fact that any such order would have to exclude acute care hospitals because the Board has already promulgated a substantive regulation

governing the bargaining-unit question in that context. See 29 C.F.R. § 103.30. The APA provides that a regulation can only be amended or repealed via rulemaking. See 5 U.S.C. § 551(5) (defining rulemaking as the "agency process for formulating, amending, or repealing a rule") (emphasis added); see also 29 U.S.C. § 156 ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of [the Act].") (emphasis added). Therefore, an agency order that effectively amends an existing regulation is a substantive rule that is subject to the APA's rulemaking requirements. See, e.g., Anaheim v. FERC, 723 F.2d 656, 659 (9th Cir. 1984) (explaining that agencies "may not use adjudication to circumvent the [APA's] rulemaking procedures"); Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1332 (9th Cir. 1982) (finding that agency abused its discretion by using adjudication to enforce a requirement that conflicted with the agency's existing regulations); cf. Shell Offshore, Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001) ("[T]he APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation."); Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."). In circumventing the rulemaking requirements of the APA, the Board would also circumvent the requirements imposed by statutes such as the Congressional Review Act, which provides the Nation's elected representatives with an important device for combating agency overreaching.

Finally, the conclusion that rulemaking would be the only appropriate procedural means for enacting sweeping changes of existing standards is further confirmed by the fact that the

Board currently has before it at least two rulemaking petitions seeking such changes, the first of which has been pending for almost four years. *See In re Rulemaking Regarding Members-Only Minority-Union Collective Bargaining (Steelworkers Union)* (filed Aug. 14, 2007); *In re Rulemaking Regarding Members-Only Minority Union Collective Bargaining (Change to Win)* (filed Jan. 4, 2008). However, instead of taking action on these petitions as is required by the Board's own regulations, *see* 29 C.F.R. § 102.125 (explaining that the Board "shall" take action on all rulemaking petitions); *see also* 5 U.S.C. § 706(1) (explaining that a court must "compel agency action unlawfully withheld or unreasonably delayed"); *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (holding that agency action on a rulemaking petition is subject to judicial review), the Board has apparently chosen to use this adjudication to effectuate sweeping changes in an effort to avoid its own requirements and those of other federal law. Doing so would clearly be inappropriate.

# D. The Use Of Adjudication Instead Of Rulemaking To Promulgate An Otherwise-Unnecessary "One Size Fits All" Rule For Defining Appropriate Bargaining Units Would Constitute Prejudicial Error

The APA provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. In calling for *amicus* briefs, the Board claimed that it was "evident that adjudication, which is subject to judicial review, provides for no less scrutiny and broad-based review than does rulemaking, *especially where interested parties are given clear notice of the issues and invited to file briefs.*" Dec. 22, 2010 Order at 3 (emphasis added; internal quotations omitted). By this statement, the Board appears to suggest that its call for *amicus* briefs would render harmless any violation of the APA's rulemaking requirements. This cavalier misstatement of the law illuminates the absence of legal support for this effort by the Board.

As the court of appeals explained in *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979), the APA's rulemaking requirements are "designed to ensure that affected parties have an

opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." In so holding, the appellate court rejected an agency's assertion that its solicitation and receipt of comments using a procedure other than that prescribed by the APA constituted harmless error. The agency's violation of the APA "plainly affected the procedure used"; therefore, the appellate court refused to "assume that there was no prejudice to petitioners." *Id.* at 214-15; *see also Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (rejecting agency's argument that failure to comply with APA's rulemaking requirements constituted harmless error because such a failure "cannot be considered harmless if there is any uncertainty at all as to the effect of that failure").

Furthermore, when compared to rulemaking, the use of adjudication to announce a "one size fits all" rule for defining appropriate bargaining units would, in fact, provide for less scrutiny and broad-based judicial review. A Board order determining an appropriate bargaining unit is usually not considered a "final order" subject to judicial review, except as it may be drawn into question by a later petition for enforcement or review of an order restraining an unfair labor practice. *AFL v. NLRB*, 308 U.S. 401, 411 (1940). *But see Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (discussing limited exception to the foregoing principle where the Board's unit-determination order is made in excess of the Board's delegated powers and contrary to a specific prohibition in the Act).

In contrast, the outcome of any rulemaking proceeding would be subject to *immediate* judicial review even by those who are *not* technically parties to any Board proceeding. *See*, *e.g.*, *Am. Hosp. Ass'n*, 499 U.S. 606; *see also Abbot Labs. v. Gardner*, 387 U.S. 136, 154 (1966) (explaining that a trade association's pre-enforcement challenge of a regulation would be

beneficial because, "[i]f the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation"). Furthermore, in the rulemaking context, an agency's final rule must be accompanied by a response to all significant comments. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (per curiam). And, agency rulemaking requires that the agency support its position to other impartial federal agencies and, in certain circumstances, to Congress. Adjudication provides absolutely none of these protections.

Therefore, the Board's assertion that adjudication provides for no less scrutiny and broad-based review than does rulemaking, especially as it relates to third parties such as RILA's members, is simply untrue and unbecoming of a responsible federal agency.

#### IV. <u>CONCLUSION</u>

For all the foregoing reasons, the Board should not create the presumptive rules contemplated in Questions 7 and 8 of its invitation to file briefs in this case.

March 8, 2011

Respectfully submitted,